Supreme Court, U. S.
FILED
AUG 6 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974

No. 74-1025

BURTICE A. HINES, *et al.*,
Petitioners,

vs.

ANCHOR MOTOR FREIGHT, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT ANCHOR MOTOR FREIGHT, INC.

BERNARD S. GOLDFARB
GOLDFARB & REZNICK
1825 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
Attorney for Respondent,
Anchor Motor Freight, Inc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5847

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QUESTION PRESENTED FOR REVIEW

When the parties have exhausted the contractual grievance machinery and the employer has prevailed in a discharge under the labor agreement and the committee decision is predicated on a rational basis, can a claim of wrongful discharge prevail against the employer subsequently in court proceedings when there is no evidence of any wrongdoing by the employer and no evidence of any taint in the grievance machinery, regardless of any claim against the union for unfair representation, and particularly when there is no evidence that the claim of unfair representation would have produced a different arbitral result.

STATUTES INVOLVED

In addition to the statute cited by the petitioners, the following statutes are also involved:

29 U.S.C. §157

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. §171 (a)

> It is the policy of the United States that—
>
> (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

29 U.S.C. §173 (d)

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .

STATEMENT OF THE CASE

A. Summary of Proceedings Below.

The petitioners brought this action in the United States District Court for the Northern District of Ohio, Eastern Division, alleging that they had been wrongfully discharged from their employment by Anchor Motor Freight, Inc., where they had been employed as truck drivers. They further alleged that Teamsters Local Union No. 377 and the International Brotherhood of Teamsters had breached their duty of fair representation by virtue of the manner in which they handled the petitioners' grievances in connection with the aforementioned discharges.

After several years of discovery, all of the defendants moved for summary judgment and each defendant's motion was granted by the district court. The Sixth Circuit affirmed the summary judgments in favor of Anchor Motor Freight and the International Union and reversed and remanded the judgment in favor of the local union. The petitioners then asked this Court for review, and certiorari was granted.

B. Anchor Reimbursement of Drivers for Falsified Motel Receipts Leads to Their Discharges.

Each of the petitioners was formerly employed by Anchor Motor Freight, Inc. as an over-the-road truck driver, transporting automobiles from the Anchor terminal adjacent to the General Motors plant at Lordstown, Ohio, to automobile dealers throughout the eastern part of the United States. The employment relationship between the petitioners and Anchor was governed by a labor agreement known as the National Master Automobile Transporters Agreement and Central Conference Area Supplemental Agreements covering Truckaway, Driveaway and Local Agreements. This contract is made up of a National Master

Agreement covering all car haulers, a Central States Supplement covering terminals located in the central part of the United States, and local riders covering minor details for individual terminals.

Anchor reimbursed its drivers for money spent for lodging while the drivers were on the road, based on motel receipts submitted to the company. On May 31, 1967, Anchor Motor Freight learned that some of its drivers were reporting expenses to Anchor for reimbursement in amounts in excess of the expenses which these drivers actually incurred while they were staying overnight in Batavia, New York, at the Towne Manor Motel and Apartments. Anchor conducted an extensive investigation immediately. Robert DeLeo, the Lordstown Terminal Safety and Personnel Director at that time, interviewed Anthony Pagano, the motel room clerk. DeLeo inquired as to the motel's rates for single rooms and double rooms, and then called the Lordstown terminal and found out that these drivers were charging the company a different rate than the established rate at the motel (A. 121). Mr. DeLeo obtained a sworn statement from Pagano at that time, stating that the motel's records were accurate (A. 180-186). Pagano also gave DeLeo hotel registry cards and copies of the motel receipts (A. 122). On that same date DeLeo obtained a statement from Joseph Repicci, owner of the motel, stating that the information submitted by Pagano was correct (A. 187). Repicci also gave Anchor a sworn statement that on the evening of May 15, 1967, three of the petitioners each paid $5.20 for lodging, only one of them registered, and *each* of them was given a receipt in the amount of $8.32 (A. 188; see also exhibits at A. 243).

Anchor officials assembled this information at their terminal at Lordstown. They compared the information given by Pagano and Repicci with the information submitted by the drivers for reimbursement. This included

receipts for hotel expenses, the summary of driver expense forms completed by the drivers, and the drivers' logs (A. 235 through 268). The exhibits on page 235 of the Appendix are typical of the information adduced by this investigation. The receipts presented to Anchor by drivers Fitzpatrick and Cartwright for May 23, 1967 state that each driver paid $8.32 for a room on that day. Fitzpatrick's receipt is for Room 9, and Cartwright's receipt is for Room 7. However, the hotel registration card for that date shows that both Cartwright and Fitzpatrick stayed in Room 9 on May 23, 1967, and that they paid a *total* of $10.40 for the room, i.e., each driver actually paid $5.20. This was confirmed by Pagano (A. 186). There was similar evidence involving each of the petitioners.

Anchor's Director of Labor Relations Daniel Sandy investigated the incident further. On June 5, 1967, Sandy flew to Batavia, New York, and interviewed Pagano and Repicci (A. 129-130). Pagano described for Sandy the place where the drivers stayed and how they were charged a stated amount. This amount was different than the amount the drivers charged Anchor for reimbursement (A. 130). Repicci gave Sandy a notarized statement at that time (A. 123), which stated that on many occasions Anchor drivers had been assigned two to a room with just one driver registering and that the motel received payment from one person but gave two separate inflated receipts as the drivers requested. Repicci stated that this was done in order to prevent the drivers from going to other motels (A. 189).

Sandy further stated that he conducted an inquiry as to the reliability of Pagano and Repicci. He found that these people were substantial citizens and above reproach (A. 133).

C. At the Insistence of the Union, Discharges Are Held in Abeyance Pending Joint Grievance Committee Hearing.

Anchor requested the discharge of the petitioners on June 5, 1967, pursuant to Article 32 of the labor agreement which provides that "[t]he Employer shall not discharge or suspend any employee without just cause," and that "no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty . . . ." (A. 170). On that date a meeting was held at the Anchor terminal. In attendance were the terminal grievance committee, the business agents from Teamsters Local 377, the petitioners, and representatives of Anchor (A. 103). The evidence against the petitioners was presented at that meeting. It consisted of the motel registration cards which DeLeo had obtained from Pagano, the motel receipts which the drivers had submitted to Anchor for reimbursement of expenses, the Anchor form entitled Summary of Driver Expenses which each driver signed when he presented the aforementionel motel receipts for reimbursement, the daily logs kept by each driver, and the statements of Pagano and Repicci (A. 123, 173 through 189, and 235 through 268). The motel registration cards, which were kept as part of the motel's regular business records until Mr. Pagano made them available to Anchor, show that more than one of the petitioners stayed in a particular room on a particular night. It also states the total amount that they paid for that room. However, each man had presented to the company a receipt for the price of a *single* room for that night, as shown on the receipts submitted to Anchor and the Summary of Driver Expenses.

This documentary evidence, which was presented as to each of the petitioners, supported by the statement of the motel clerk Pagano and motel owner Repicci, clearly indicated that each of the petitioners had been dishonest,

had submitted false receipts in excess of the expenses which he had actually incurred, and had thereby improperly received "reimbursement" in excess of the amount to which he was entitled.

Notwithstanding this evidence, at the meeting on June 5, 1967, the petitioners, Local 377 and its business agents insisted that the petitioners were innocent and that Anchor must rescind the discharges and return the petitioners to work. After extensive discussions it was finally agreed that the case would be submitted to the Joint Arbitration Committee, which was the contractually established arbitrator, and that the petitioners would continue to work until the committee reached a decision on the matter (A. 133).

The contractual grievance procedure is set forth in Article 7 of the National Master Agreement (A. 218-224). Section 2 provides that grievances "shall first be taken up by the employee involved, and if no settlement is reached, then taken up between the business agent of the Local Union involved and the Employer representative." If the dispute is not resolved, "either party has the right to file its grievance with the appropriate Local Committee or Joint Area Committee referred to in Section 3. . . ." (A. 218-19). Section 3 establishes Joint Area Committees, consisting of an equal number of employer and union representatives (A. 220). Section 4 (b) empowers the Joint Area Committees "to settle disputes and grievances which cannot be settled in accordance with Section 2 of this Article." (A. 222). Section 5 provides that "a decision by a majority of a Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected." (A. 222).

D. Parties and Grievants Are Heard and the Joint Grievance Committee Sustains the Discharges.

On July 26, 1967, the petitioners' case was presented to the Joint Arbitration Committee in Detroit, by the petitioners and Local 377 business agent John Angelo, who asserted that the men had been falsely accused. He charged that if anyone was guilty it was the motel owner and/or clerk (A. 135-136). Each petitioner was given an opportunity to speak in his own behalf before the committee and some of them did speak directly to the committee. For example, petitioner Hines stated that "I made my statement and I was there in person and told them what happened." (A. 32). Petitioner Croft stated that Angelo told the committee that "we didn't take any money or anything." He stated that he personally told the committee that he had an opportunity to say all that he had to say that day to the committee (A. 75-76). He further testified that he attended the hearing, that everybody who wanted to go attended the hearing, and that anybody who wanted to say anything in his own behalf was given the right to do so (A. 80). He stated that he told the panel "what took place as far as what I paid for the room and I had nothing to do with the card that the motel owner kept to himself," and that the evidence that went to the panel was his disclaimer of doing anything wrong (A. 80). He also said that "maybe two-thirds of the men had something to say" (A. 81). The union's presentation, including the presentations by the petitioners, lasted approximately three hours (A. 136). The company's presentation lasted an additional forty-five minutes (A. 139). The parties were given an opportunity for rebuttal. Finally, the committee inquired of the petitioners as to whether they felt they had been given a full hearing and they said that they had (A. 141).

The panel deliberated for approximately two hours

(A. 141). Its decision was published in the minutes of the meeting, which were distributed a few days after the conclusion of the hearings. The committee held in these cases that "[b]ased on the facts, evidence and statements presented with respect to these eleven cases, the discharges of [the petitioners] are upheld." (A. 193). According to the terms of the applicable labor agreement, this decision is final and binding (Article 7, Section 5(c), A. 222).

E. Petitioners Retain Counsel and Seek a Rehearing on "New Evidence"; Committee Finds Evidence Is Not "New."

After the committee had upheld the discharges the petitioners engaged the services of an attorney. The attorney went to Batavia and obtained an affidavit from the motel owner, Repicci (A. 48). He did not obtain an affidavit from the room clerk, Pagano. Based on Repicci's affidavit the petitioners requested a rehearing, and the case was again presented to the Joint Arbitration Committee on October 26, 1967 (A. 145). At that time the union stated that they had new evidence in the matter and requested that the case be reopened on this new evidence. A hearing was held on the new evidence and Mr. Angelo initially spoke for the union. He distributed copies of a document which he then read to the committee (A. 146). Angelo read Repicci's statement to the committee, which is reproduced at pages 199 through 209 of the Appendix. In this statement, all that Repicci said was that his previous statement was based on the motel records and on what Pagano had told him and that he had no personal knowledge of the amounts paid by these particular men.

After reading the statement to the committee Angelo asked the petitioners if he had left anything out, if there

is anything that they had forgotten to tell him or that they want him to tell the committee. He also asked them to go ahead and talk to the committee. They were all satisfied that he had presented the case properly on their behalf (A. 90).

The company took the position that nothing new had been introduced and that this "new evidence" was repetitious, as the petitioners and the union had taken the same position on the same issues at the original hearing (A. 147).

The committee decided that "by unanimous vote, the committee held that the requests for rehearing are denied because there was no new evidence presented which would justify a reopening of this case." (A. 212).

The contractual grievance procedures were therefore fully exhausted and the discharges fully sustained.

F. Witness Pagano Recants Prior to a "Court" Proceeding More Than One Year After the Grievance Committee Sustained the Discharges and Thereby Avoids Testifying in "Court."

On September 29 and 30, 1968, approximately one and one-half years after the June 5, 1967 discharge meeting and more than one year after the arbitration hearing (July 26, 1967), Anchor requested Repicci and Repicci sent Pagano to Cleveland to testify on Anchor's behalf at an unemployment compensation hearing involving some of the petitioners (A. 275-276). In a deposition given in *1971* in this lawsuit, Pagano claimed that it was at this point, when he was about to testify in "court" (A. 57), that he changed his version of the story. He now claimed that *he* had kept the difference between the amounts that appear on the motel records and the amounts on the receipts submitted to Anchor (A. 55-57). Because he changed his story Pagano was not required to testify in "court."

At the time of both grievance committee hearings the evidence overwhelmingly indicated that the petitioners were dishonest and that the discharges were valid. No evidence was withheld from the Committee nor does the record indicate any such suggestion. The committee heard everything the petitioners were able to submit, including the second Repicci statement. The union did not withhold or prevent the Committee from hearing Pagano's second story because he was only telling one story—that the petitioners were the culpable parties—and even the petitioners' attorney was unable to obtain a contrary story from him in 1967.

Even after that date, there is still no reason to assume as the petitioners do that Pagano's second statement is true and his first statement, also given under oath, is no longer to be believed. In any event, these matters were *in issue* and were considered by the committee in both hearings.

During his deposition Pagano was asked if anyone from Anchor had forced him to tell anything but the truth at any time. He responded, "No. I did this all on my own." (A. 61).

G. Petitioners Seek Redress Before the National Labor Relations Board but the Labor Board Finds Insufficient Evidence of an Unfair Labor Practice and General Counsel Denies Two Appeals for the Reason that Employees Were Discharged Because of the "Company's Good Faith Belief of Their Dishonesty."

The petitioners also filed unfair labor practice charges against Anchor and Local 377 arising out of the discharges which are the subject of this case. On January 9, 1968, the Acting Regional Director of the National Labor Relations Board, Region 8, ruled that the charges against

Anchor and Local 377 have been carefully investigated, that there is insufficient evidence of an unfair labor practice, and that he is refusing to issue a complaint in these matters (A. 269-270). Petitioners then appealed to the National Labor Relations Board from the Regional Director's refusal to issue a complaint. On April 1, 1968, the general counsel of the National Labor Relations Board informed petitioners that their appeal is denied. The general counsel indicated that based on the evidence that the company had of the employees' dishonesty, "the burden could not be sustained of establishing that the employees had been discharged for any reason other than the Company's good faith belief of their dishonesty." (A. 271).

Petitioners again requested reconsideration from the general counsel of the National Labor Relations and on May 7, 1968, their request was again "rejected."

It is the position of the petitioners that the subsequent change of position by Pagano, many months after the conclusion of the grievance committee adjudication, renders the discharges "wrongful." They further contend that what they characterize as Pagano's later admission "overwhelmingly" establishes the petitioners' innocence. However, the petitioners do not explain why the second Pagano statement is entitled to be treated as credible and his first statement, which was also made under oath, is not entitled to be believed, nor is it explained why Pagano, who was available to petitioners' counsel before the rehearing at Detroit to determine whether new evidence would justify the grievance committee to rehear the case, does not change his original claim that the men requested and received inflated motel receipts. In any event this very issue was before the grievance committee. On the same deposition in 1971 where Pagano recants he also states that other hotels in the area give inflated receipts. "According to my idea, I think they are all doing it." (A. 59).

H. Anchor Is Sued by Employees and After Extensive Discovery the District Court Grants Defendants' Motions for Summary Judgment and the Court of Appeals Affirms as to Anchor and the International Brotherhood of Teamsters.

The petitioners were discharged pursuant to the labor agreement, and the discharges were sustained by the grievance machinery established in the contract. The grievance committee heard testimony in support of the petitioners' allegations that the motel clerk (Pagano) and/or the motel owner (Repicci) were the dishonest parties who had kept the difference between the amounts appearing on the registration cards and the amounts on the receipts submitted to Anchor. The committee resolved this specific question adversely to the petitioners when it held that the discharges would be sustained. The petitioners then filed the instant case in the United States District Court for the Northern District of Ohio. The defendants filed motions for summary judgment, and since there was no evidence substantiating the petitioners' allegations, on September 25, 1973, the district court granted Anchor's motion for summary judgment, holding that

> [T]he Joint Committee in Detroit upheld the company's position; and further, on a rehearing for new evidence, again affirmed the discharge of the employees. Thus, all of the available steps of the grievance procedure have been followed and a decision rendered. This court, in following the dictates of the Trilogy as laid down by the Supreme Court, can come to no other conclusion but that the summary judgment motions by defendants must be granted and the finality of the arbitration process affirmed. 72 LC ¶13,987.

On November 22, 1974, the United States Court of Appeals for the Sixth Circuit affirmed, stating that petitioners are

attempting to relitigate their grievances and holding that

> No evidence of any misconduct on the part of the employer to avoid the arbitration award is suggested. Although appellants argue that there was a conspiracy between the union and the company, none of the evidence offered to substantiate this claim is sufficient under the requirement of *Bawloski, supra*, that something more than suspicion be shown. Accordingly, we hold that the district court correctly granted summary judgment in favor of Anchor Motor Freight. 506 F.2d 1153, 1157-1158 (Citations omitted).

SUMMARY OF ARGUMENT

Can an innocent party to an arbitration proceeding pursuant to a collective bargaining agreement be prejudiced and penalized by virtue of the wrongful conduct of the other party, particularly when there is no evidence that such "wrongful conduct" had any effect on the outcome before the grievance committee. The law is very clear that arbitration of labor disputes is in the national interest. The only variations are in those cases where a statute bestows an individual right such as in a civil rights matter (*Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974)) and on the other hand those situations where employer *and* union jointly contribute to the wrong by a breach of contract and unfair representation (*Vaca v. Sipes*, 386 U.S. 171 (1967), although the employer was not a party and the real issue in the case was the extent to which the union was obligated to utilize the grievance machinery).

If we regard *Alexander v. Gardner-Denver Company* and *Vaca v. Sipes* as opposite ends of the spectrum, we have before this Court a middle road which should lay the predicate for the proposition that so long as there is no collusion, conspiracy or fraud to taint the grievance machinery an innocent employer shall not suffer any penalties as a result of the wrongdoing of the union and the arbitral award shall remain intact, thereby maintaining the integrity of the arbitral process and confining all damages to the union, for the reason that the duty to fairly represent is exclusively and separately the union's, and liability for a breach thereof is not conditioned on any joint employer conduct, provided, of course, that the union's unfair representation is of sufficient import to have changed the grievance committee result.

ARGUMENT

I. Contractual Arbitration of Labor Disputes Is National Congressional and Judicial Policy.

In the Labor Management Relations Act of 1947, as amended, Congress declared that it is the policy of the United States that "sound and stable industrial peace in the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees." 29 U.S.C. §171(a). Congress further declared that "final adjustments by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d).

It is in the national interest to effectuate the terms of collective bargaining agreements and to reinforce the bargained for dispute resolution mechanism. "Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing . . ." 29 U.S.C. §157.

The importance of giving full effect to grievance and arbitration provisions as negotiated by the parties and as incorporated into labor agreements has long been recognized by this Court. In *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), the Court held that "arbitration is the substitute for industrial strife"; that it is "part and parcel of the collective bargaining process itself"; and that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." The Court further stated that "arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."

In *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), the Court instructed the federal courts to defer to the decisions made under contractually established grievance procedures, for to do otherwise "usurps a function which under that regime is entrusted to the arbitration tribunal." In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), the Court reiterated the proposition that negotiated grievance procedures must be supported when it further discouraged judicial review of the merits of arbitration decisions by holding that "review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final."

In *Humphrey v. Moore*, 375 U.S. 335 (1964), this Court held that the decision of a joint grievance committee, such as the grievance committee in this case, is final and binding on the parties. And, in *Republic Steel v. Maddox*, 379 U.S. 650 (1965), the Court stated the requirement that an employee making a claim for breach of collective bargaining agreement is bound by the terms of that agreement, including the contractual grievance procedures. This Court has unequivocally adopted a position that negotiated grievance procedures are entitled to the support of the judiciary and that the final and binding resolution of a dispute under a labor agreement must in fact be "final and binding."

State courts likewise will refuse to vacate an arbitration award even though there may be "an error of law or fact. It has been held that the arbitrator is the final judge of both law and facts." An award will not be set aside where "no abuse of authority appears." *Goodyear v. Local Union No. 200*, 42 Ohio St. 2d 516 (1975).

This Court also held that if the parties choose a certain "instrument for the definitive settlement of grievances under the agreement . . . it is of course not open to the courts to reweigh the merits of the grievance." See *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Riss & Company*, 372 U.S. 517 (1963), approving a joint grievance committee identical with the one involved in this case.

II. National Policy Must Be Supported Unless a Statutory Prohibition or Joint Employer-Union Violations of Law or Contract Dictate Otherwise.

This Court has created certain limited variations to the doctrine of finality of the grievance procedures. The first major variation was established in *Vaca v. Sipes, supra,* where the Court held that an employee may seek judicial relief if "the union has sole power under the contract to invoke the higher steps of the grievance procedure, *and* if the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." 386 U.S. at 184. The second major variation was recently established in *Alexander v. Gardner-Denver Company, supra.* The Court held that where a statute such as Title VII of the Civil Rights Act of 1964 establishes an *individual* right, independent of the labor agreement, an employee does not forfeit his private cause of action under the statute if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement. This Court made it very clear that Title VII rights "are absolute and represent a congressional command . . ." and distinguished such rights from collective bargaining rights which "may be exercised or relinquished by the union as collective-bargaining agent . . ." It distinguished individual rights from the "majoritarian process." 415 U.S. at 51. In this case we are dealing with the majoritarian process and collective bargaining rights.

In their brief, the petitioners have alleged that the *Vaca v. Sipes* variation is relevant to this case, and that the decision of the Sixth Circuit is contrary to this Court's decision in *Vaca v. Sipes.* There are two fundamental differences between *Vaca* and the instant case. First, *Vaca* was a case in which the union refused to process a grievance to

the final stage of the contractual grievance procedure. Secondly, the employer was not a party to that lawsuit, and therefore the rights and obligations of the employer were not in issue before the Court. In this case, however, the union *did* process the petitioners' grievance through the final stage of the grievance procedure, i.e., to arbitration before the joint grievance committe. In fact, the union took the case to the arbitral panel on two separate occasions, and on both occasions the discharges were upheld. Secondly, in this case the employer and the union are *both* defendants. Unlike *Vaca* where the rights of the employer were not in issue, in the present case the question of the rights of the employer is a major issue for this Court to determine.

This Court has never directly confronted the issue of whether an employer whose position has been sustained by a final and binding award under a fully exhausted contractual grievance procedure can be subjected to further jeopardy by virtue of the allegedly wrongful conduct of the employees' representatives of their own choosing, i.e., the labor union, when the employer has not in any way participated in the union's allegedly wrongful conduct. While fitting within the line of cases stemming from the *Steelworkers Trilogy, Humphrey v. Moore, and Republic Steel v. Maddox,* the instant case represents a third variation that, in this case, the rights of an innocent employer must be recognized and protected. A vindicated employer is not obligated to give disgruntled employees rematch after rematch until they have finally selected victorious "representatives of their own choosing."

III. Unfair Representation Is Exclusively a Union Duty and Is Not Dependent Upon Joint Employer Conduct.

It is important to recognize the genesis of the wrongful discharge-unfair representation lawsuit. These are two distinct lawsuits which have been joined as a matter of convenience. The employer is not an indispensable party in the suit against the union and the union is not an indispensable party in the case against the employer. *Louis v. Shubert*, 300 F. Supp. 174 (W.D. Mo. 1969) and *Young v. United Steelworkers of America*, 49 F.R.D. 74 (E.D. Pa. 1969).

The allegedly wrongful acts of the employer and union are independent, as there has been no allegation that Anchor participated in the union's allegedly unfair representation, and there has been no allegation that the union participated in the discharge. Therefore, there is nothing to preclude a court from concluding, as the Sixth Circuit did in this case, that the case against the employer must be dismissed while at the same time holding that the case against the union must be set for trial. By this ruling the court has held that since the employer has been exonerated by the grievance committee the petitioners' only remaining claim is against the union, if any claim exists.

This Court has recognized that unfair representation and wrongful discharge are two separate and distinct causes of action. If a wrongful discharge is coupled with a claim of unfair representation there is no question that there can be an apportionment of damages. But where there is a claim of unfair representation and the employer is not implicated a separate action will lie against the union and a judgment against it can be had "in any event . . . for those damages that flowed from their own conduct." *Czosek v. O'Mara*, 397 U.S. 25 (1970). It is conceivable that the union may be responsible "for the whole of such damage."

See *Richardson v. Communications Workers of America*, 443 F.2d 974, 982 (8th Cir. 1971).

Liability and damages are interwoven with remedies that may be available to the petitioners from the wrongdoer and it would not be "uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

The employee is not without a remedy even if the employer is found free from wrong because an individual employee "has a right to remedy against the union breaching its duty of fair representation—a duty derived not from the collective bargaining contract but implied from the union's rights and responsibilities conferred by federal labor statutes." *Humphrey v. Moore, supra*, 375 U.S. at 356, and cases cited therein. In that case, like this one, petitioners were told "that they had nothing to worry about." This Court found "there is no substantial evidence of fraud, deceitful action or dishonest conduct." This Court stated further that "[w]e find in this evidence insufficient proof of dishonesty or intentional misleading on the part of the union. And we do not understand the court below to have found otherwise."

This Court also in *Humphrey v. Moore* concluded in an analogous situation that "[t]he decision of a committee, reached after proceedings under the agreement; is final and binding upon the parties, just as the contract says it is." Citing *General Drivers, etc. Union v. Riss & Company, supra.*

There is no factual or legal basis for claiming that there must be joint action between the union and the employer before any damages can be assessed, i.e.. that damages must be assessed against both. If one party is free from wrong all the damages are charged to the other party. If the union is free from wrong all damages may be charged

to the employer. Nothing prohibits the union from being assessed all damages where the employer is free from wrong. See *De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO,* 425 F.2d 281 (1st Cir. 1970).

A back pay award was assessed against a union. The court said, in referring to "unfair representation," that "[t]he action exists independently of the §301 action against the employer . . ." *Butler v. Teamsters, Local 823,* 76 LC ¶10,739 (8th Cir. 1975).

The petitioners have argued that the employer must remain a party for the reason that "relief against the union alone would not be sufficient to make them whole." (Petitioners' Brief, p. 21). Where "[t]he evidence fails to show any conspiracy or joint action" and the union has failed to fairly represent a discharged employee "[t]he court cannot assume that the arbitrators would have found against [plaintiff] if his claim had been fairly presented." The court held that the arbitral award must stand even though it found the union failed to properly represent, and assessed damages against the union. No relief was granted against the company. See *Thompson v. International Association of Machinists,* 258 F. Supp. 235 (E.D. Va. 1966).

In this case, however, there is no longer a claim against the employer, as that issue has been decided by the committee. The petitioners' only remaining claim is against the union. They are not without a remedy. Rather, their remedy is against the *wrongdoer*. Anchor Motor Freight has done no wrong and therefore cannot be subjected to liability. The duty to represent fairly cannot be imputed to the employer and a breach of that duty causing damages shall be assessed only against the guilty party.

In his concurring opinion in *Humphrey v. Moore, supra,* Justice Goldberg addressed himself to the problem raised in this case. He stated that

> . . . [a] claim of breach of the union's duty of fair representation cannot properly be treated as a claim of breach of the collective bargaining contract supporting an action under §301 (a). This is particularly apparent where, as here, "[n]o fraud is charged against the employer. . ."

He stated that this "does not mean that an individual employee is without a remedy for a union's breach of its duty of fair representation . . . [since] an individual employee has a right to a remedy against a union breaching its duty of fair representation . . ."

Justice Goldberg further stated that where the employer had not willfully participated in the union's breach of duty of fair representation, the courts should not convert a breach of the *union's* duty to individual employees into a breach of the collective bargaining agreement between the employer and the union. He concluded that

> [i]n safeguarding the individual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents.

This is where Anchor Motor Freight stands in the present case.

IV. Anchor's Vindication, Contractually, Administratively and Judicially, Bars Petitioners' Claim Against Anchor.

Anchor's discharge of the petitioners has been reviewed and adjudicated on seven distinct instances, each of which on its own should be sufficient to conclude the

process and avoid a multiplicity of actions arising out of the same "claims."

1. Anchor was vindicated in the grievance committee decision (A. 190-198).

2. Anchor was vindicated when the grievance committee refused to rehear based on "new evidence." (A. 210-212).

3. Anchor was vindicated when the petitioners sought relief from the National Labor Relations Board (A. 269-270).

4. Anchor was vindicated when the general counsel denied an appeal from the Regional Director's refusal to issue a complaint (A. 271-272).

5. Anchor was vindicated when the general counsel refused to reconsider based on "newly discovered evidence." (A. 273-274).

6. Anchor was vindicated by the granting of summary judgment in favor of Anchor by the United States District Court.

7. Anchor was vindicated by the affirmance of the summary judgment by the United States Court of Appeals for the Sixth Circuit.

Inasmuch as Anchor's conduct has been reviewed contractually, administratively and judicially on seven distinct occasions and each time Anchor has been found to be free from fault it is not within the purview of an appeal to this Court to "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). No such showing appears here.

V. Courts Should Not Review the Merits of Arbitration Decisions, Especially Where a Failure to Represent Does Not Affect the Fairness of the Arbitration Process and Where There Is No Evidence That It Would Have Made a Difference in the Outcome of the Proceeding.

In *Humphrey v. Moore, supra,* this Court recognized that something more than mere unfair representation is required before a joint committee decision can be overturned. In that case the Court stated that the plaintiffs have not proved their case, in that they "have not suggested what they could have added to the hearing by way of facts or theory if they had been differently represented." The Court agreed with the trial court's finding that it would be "idle speculation to assume that the result would have been different had the matter been presented differently." 375 U.S. at 351. Implicit in this holding is the concept of harmless error, i.e., that in order to overturn an arbitration award the petitioners must demonstrate not only that the union breached its duty of fair representation, but also that but for the union's breach the result of the arbitration would have been different. Any breach of the duty to represent which is not of sufficient gravity to have affected the arbitrator's decision cannot be said to constitute adequate justification to warrant upsetting the finality of the award. It simply has not affected the overall fairness of the proceeding.

The petitioners in this case have alleged that the union breached its duty of fair representation when it refused to go to Batavia, New York, to investigate and when it told the petitioners that it is unnecessary for them to conduct their own investigation. It is evident on the record that the outcome of the arbitration was not affected by this "breach." The facts of this case indicate that even if the union had sent an investigator to Batavia no exculpatory evidence

would have been unearthed before the time of the Joint Committee hearings. The record shows that after the committee first upheld the discharges the petitioners hired an attorney who traveled to Batavia to investigate on their behalf (R. 48). Although the attorney was able to secure an affidavit from the motel owner, Repicci (which the committee considered and concluded was not "new evidence"), he did not obtain an affidavit from the room clerk, Pagano. If the petitioners were unable to convince Pagano to change his story when they did investigate, how can it be claimed that the union, by conducting its own investigation, would have been able to accomplish more than their attorney? How can the union's failure to investigate prevent the evidence of Pagano's inconsistent statement from reaching the committee, when Pagano would make no such statement at that time? Even if it is assumed, arguendo, that a breach of duty occurred, it was certainly a harmless breach, as subsequent events show that investigatory efforts would have been futile.

The question presented in petitioner's brief (page 4) is not borne out by the facts nor is it even suggested by the record that the "union breached its duty of fair representation in processing their grievance so as to deprive them and the grievance committee of overwhelming evidence of their innocence of the alleged dishonesty for which they were discharged."

An arbitration award should not be upset every time a breach of representation is shown since such breach is not of sufficient consequence to warrant undercutting the award. Often a union may act arbitrarily toward an employee but not affect the outcome. To hold otherwise would give employees unlimited retrials. All union conduct would be scrutinized to determine whether there was bias; every smirk or smile of a union agent would lend itself to a jury question; withholding of evidence, for any

reason, would be grounds for a rematch. The inherent evils are obvious.

The record does not reveal that the award would have been otherwise even if it were required that before petitioners can attack the arbitral award on the basis of being unfairly represented that they "must prove that but for the inadequacy of the representation by the union, the discharge would not have been sustained by the arbitration board." *Rodriguez v. Teamsters Local 679, Cannery Warehousemen, Food Processers, Drivers and Helpers*, 68 LC ¶12,815 (Calif. Superior Court, Santa Clara County, No. 261393, May 30, 1972). Before a suit will lie against an employer the arbitrator's decision must be overthrown, "a result not easily achieved. . . ." A principle of res judicata applies. See *Davidson v. International U.U.A., A. & A.I.W., Local No. 1189*, 332 F. Supp. 375 (D. N.J. 1971).

The facts of this case demonstrate that petitioners were given a fair hearing in front of the Joint Grievance Committee—a hearing at which the very issue they are now trying to again raise, the credibility of the motel clerk, was thoroughly considered. The petitioners, as well as their union representative, presented this issue to the panel. Although they lost at arbitration, the proceedings were, by their own admissions, convincingly fair, and therefore the award should be considered final. Courts are concerned with the fundamental fairness of the arbitration process. *Amerada Hess Corp. v. Local 22026*, 87 L.R.R.M. 2698 (D.C. N.J. 1974). A different conclusion should not result merely because of a breach of the duty of fair representation.

Even the National Labor Relations Board is now giving "full effect to arbitration awards dealing with discipline or discharge cases . . . except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other then a mere desire on the part of one party

to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding." See *Electronic Reproduction Service Corp.*, 213 N.L.R.B. No 110, 87 L.R.R.M. 1211 (1974).

So long as the employee was present and presented his case courts are not disposed to substitute their judgment for that of the arbitrator. If the proceedings are otherwise fair there has been no denial of due process. If there has been a full hearing and the award is not tainted by fraud or corruption and the arbitrator reached an honest judgment on the record the award must stand. *Sharpe v. Carolina Freight Carriers Corp.*, 377 F. Supp. 528 (D.C. Pa. 1972), *Rossi v. TWA*, 350 F. Supp. 1263 (D.C. Calif. 1972).

Not even a court of law would find it necessary to retry a case on the method of the presentation of the evidence. The award of an arbitration committee should not be treated otherwise. It has been held that "the most advantageous manner of presentation of . . . evidence by a party is not a concern of the [trier of facts]." See *Tanton v. Zubkowicz* (1972), 43 Ohio App. 2d 1 (reported July 28, 1975).

VI. A Recantation by a Witness, More Than One Year After the Arbitral Award, Does Not Abrogate the Award.

An attempt to vitiate the arbitral award on the basis of a second inconsistent statement of one of the witnesses was reviewed by the U.S. Court of Appeals for the District of Columbia Circuit in *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Company*, 442 F.2d 1234 (D.C. Cir. 1971), where a witness failed to testify in an arbitration proceeding and subsequently agreed to testify. The Court held that to allow "a rematch

before the arbitrator, merely because a witness who refused to enter the original contest has now decided to participate, would be not only to give the Guild more than the benefit of its bargain in this case, but would undercut the finality and therefore the entire usefulness of an arbitration as an expeditious and generally fair method of *settling* disputes." In quoting the district court judge the appellate court restated that unless the "parties are bound by the records made before the arbitrators, the piecemeal or staggered submission of evidence would be likely to erode the effectiveness of arbitration as a speedy and efficient forum for resolving labor disputes." The same court went on to say that even if the arbitrator had made errors of fact and law the award would not be vacated unless it "compels the violation of law or conduct contrary to accepted public policy." No such violation is compelled by this award.

An arbitration award would have no finality if the parties could attack it whenever they found "new evidence."

In another "newly discovered evidence" case, *Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885 (2nd Cir. 1963), *cert. denied*, 375 U.S. 821 (1963), an employer moved to vacate an arbitration award which ordered him to reinstate an employee who was discharged for suspicion of theft. The arbitrator had found that the employer's allegations of theft amounted to no more than rumor and gossip. Afterwards, the employer uncovered evidence which "conclusively established" the employee's complicity and alleged that the arbitration award, being based on the employee's perjurious testimony, was essentially procured by fraud. The Second Circuit flatly refused to vacate the award, holding that "the parties, having agreed to an arbitration of their differences, are

bound by the award made upon the testimony before the arbitrator."

The courts in *Newspaper Guild* and *Bridgeport Rolling Mills* recognized that the concept of finality would be eroded if an arbitration award could be vacated every time new evidence was discovered. Finality would similarly be undermined if this result could be avoided with the back door argument that a breach of fair representation has occurred.

If we were to assume that Pagano perjured himself by his sworn statement in the arbitration proceeding this would not be sufficient to set aside the award in the absence of fraud or misconduct in the *procurement* of the perjured testimony. *Atchison, Topeka and Santa Fe Railway Co. v. Barrett*, 246 F.2d 846 (9th Cir. 1957). Witness Pagano readily admits that he "did this all on [his] own." (A. 61).

In *Kirschner v. West Company*, 247 F. Supp. 550 (E.D. Pa. 1965), quoting Judge Augustus Hand with respect to an allegation of perjury:

> . . . Since it necessarily raises issues of credibility which have already been before the arbitrators once, the party relying on it must first show that he could not have discovered it during the arbitration, else he should have invoked it as a defense at that time. *Karppinen v. Karl Keifer Mach. Co.*, 187 F.2d 32, 35 (2d Cir. 1951). (Cited at p. 553).

This is precisely the current case. The issues were raised before the arbitrator, the parties had ample time to make the necessary discovery of the true facts, and in fact did cause an investigation on their own to be made.

Trial court judgments may be opened up when important evidence is later discovered, but the motion for a new trial on that basis must be made within one year of the date of judgment. Fed. R. Civ. P. 60. Traditionally

the courts, in respecting the crucial need for finality in the industrial setting, have refused to alter arbitration awards on the basis of newly discovered evidence. Hence, petitioners, who discover one witness who reverses himself more than one year after the committee sustained their discharges, should be barred from using that evidence to open up the committee's award, particularly where there is other evidence to sustain it. The issue of credibility is exclusively within the domain of the trier of fact. In short, petitioners would not have been permitted to evade the finality of a trial court's judgment by producing Pagano's statement more than one year later. An award by a joint committee should be entitled to the same degree of finality, particularly when the so-called "new evidence" does not create any *new issues*.

VII. A Decision by a Joint Grievance Committee Is Accorded the Same Degree of Finality As Any Other Method of Arbitration.

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. 173(d). The parties had established an agreed upon procedure for resolving disputes (A. 218 et seq.) and it was employed in this case.

Petitioners contend that Joint Committee procedures are so inherently susceptible of corruption that they are deserving of only a minimal standard of finality. They claim that under such procedures it is questionable whether the decision makers can act with any impartiality.

Noticeably absent from the petitioners' allegation of inherent corruption is any mention of collusion, partiality, or fraud in the instant case. In fact, the record in this

case reveals that during the arbitral hearing the petitioners were asked by the committee whether they felt they had been given a fair hearing. They acknowledged that they were satisfied (R. 140).

The committee in the instant case was comprised of an equal number of employer and union representatives. The committee members were not connected with either Anchor Motor Freight or Local 377.

The record does not reveal or suggest any evidence of fraud, bias, collusion, partiality or "horse trading" involving the committee. The petitioners are attempting to raise this question for the very first time in this case before this Court. The record is entirely devoid of evidence of any wrongdoing by the committee. This argument is procedurely and factually inappropriate in this case at this time.

This Court has already explicitly held on two occasions that decisions by a Joint Grievance Committee are to be given the same degree of finality as those by an arbitrator. *General Drivers, Local 89 v. Riss & Co. and Humphrey v. Moore, supra.* The underlying policy behind these decisions, as set forth in *General Drivers, Local 89 v. Riss & Co.*, is that the parties to a collective bargaining agreement should be able to agree on the methods they wish to utilize in definitively settling grievances. This policy is rooted in congressional declaration that the desirable method for final settlement of grievance disputes is in the manner agreed upon by the parties. 29 U.S.C. §173(d).

Likewise, in numerous cases the lower courts have repeatedly treated grievance committee decisions just as they do findings by arbitrators. No cases were found holding otherwise.

Similarly, the NLRB has not questioned the fairness of joint committee procedures. Just as with arbitration awards, the Labor Board has chosen to honor the findings of joint grievance committees. *Denver-Chicago Trucking*

Co., 132 N.L.R.B. No. 123 (1961); *Modern Motor Express*, 149 N.L.R.B. No. 147 (1964). Both of these decisions recognize the policy in favor of permitting the parties to a collective bargaining agreement to devise the machinery for the amicable resolution of their disputes, as long as there is no evidence shown of unfairness, irregularity, or collusion

Unlike outside arbitrators, persons sitting on the Joint Committee are very familiar with the operation of the industry and therefore can dispense a more knowledgeable, and therefore a more fair and more efficient brand of justice. Moreover, because the representatives sitting on the Joint Committee are not compensated, the system, besides being both effective and fair is relatively inexpensive to operate. This attribute is advantageous to the individual employee because it increases the likelihood that his union will pursue grievances to the final step.

At no time did any party express an objection to the manner in which the committee was constituted. Nowhere in the record is there even a suggestion that the committee was biased in any way. The petitioners did not allege any kind of taint in the grievance proceedings. Their only complaint was that the union had failed to properly represent them and that the discharge was wrongful, notwithstanding the committee decision. The joint grievance committee was never attacked in any way, until the petitioners' brief in the United States Supreme Court first suggesteed that joint arbitration committees are "inherently more susceptible to corruption than traditional arbitration." There is not a scintilla of evidence in this record to support these allegations. Furthermore, it is highly inappropriate for the petitioners to raise this new claim for the very first time at this stage of the proceedings. The issue of the integrity of the joint committee is entirely "extra-record" in this case.

At the joint committee hearing all defenses, including the petitioners' allegation that the motel clerk was the dishonest party, were presented to the committee. Among other things, the committee had to weigh the credibility of the written statements of the motel owner and clerk against the credibility of the oral testimony of the petitioners. By sustaining the discharges the committee resolved these questions in favor of Anchor. Its final and binding award was that the discharges be sustained.

At the time of this decision the evidence overwhelmingly indicated that the petitioners had been dishonest, as was recognized in the brief of the petitioners where they indicated that the panel's decision to uphold the discharges was "an unsurprising result in light of the evidence presented" (page 7).

It has been held "that the parties, having agreed to an arbitration of their differences, are bound by the arbitration award *made upon the testimony before the arbitrator.*" *Bridgeport Rolling Mills Company v. Brown*, 314 F.2d 885 (2d Cir. 1963), *cert. denied*, 375 U.S. 821 (1963) (emphasis added).

Summary judgment is the predominant judicial technique for sustaining arbitration awards, including joint grievance committee awards.

This Court has often said that the judiciary should not review the merits of a dispute which has been resolved pursuant to a labor agreement (*Steelworkers Trilogy*). The Court has examined the situation where the employee had been deprived of his right to exhaust his grievance procedures by the union's unfair representation (*Vaca v. Sipes, supra*). In this case, however, the Court has the opportunity to examine the equities involved when an employer in good faith, takes action which it deems right under the collective bargaining agreement, where the grievance procedures have been exhausted, and where

the employer's action has been sustained and a rational basis exists for the conclusion of the grievance committee.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

BERNARD S. GOLDFARB
GOLDFARB & REZNICK
1825 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
Attorney for Respondent,
Anchor Motor Freight, Inc.